72-6830

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

ROBERT V. PACE,
PETITIONER,

v.

LEVIN H. CAMPBELL, et al.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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RESPONDENTS.

BRIEF OF THE RESPONDENTS, LEVIN H. CAMPBELL, ANDREW R. LINSCOTT, REUBEN L. LURIE AND HARRY KALUS, INDIVIDUALLY, AND AS THEY ARE OR WERE JUDGES OF THE MASSACHUSETTS SUPERIOR COURT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The order and opinion of the Court of Appeals (Appendix A, page A-1, of the Petition for Writ of Certiorari) is not yet reported. The orders and opinions of the District Court (Appendices B, C and D, pages A-2, A-3, A-4 and A-5 of the Petition for Writ of Certiorari) are not yet reported.

Jurisdiction

The judgment of the Court of Appeals (Appendix A, page A-1, Pet.) was entered on February 28, 1973. The Petition for Writ of Certiorari was filed on May 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

The question presented is whether the District Court's judgment that the petitioner's substitute complaint should be dismissed for failure to comply with Rule 8(a) of the Federal Rules of Civil Procedure was proper.

Constitutional Provisions and Statutes

The gravamen of the Petition for Writ of Certiorari is set forth in paragraphs two (2) and three (3) on page seven (7) of the Petition:

> "(2) When the petitioner removed the State case in which he was defendant to the Federal District Court, according to Federal Statute U.S. Code Title 28, Section 1446(e), the State Court could proceed no further. However, the State court did proceed and held a trial without jury, after the defendant (petitioner herein) had been brought into the state court under a witness subpoena. As a result of said trial, the defendant/petitioner was adjudged guilty and sentenced.
>
> (3) As a result of the above trial in the State court, which was held after removal to the United States District Court had been effected, the defendant/petitioner filed a complaint in the United States District Court against the four judges and others who were involved

> in the proceedings which led to the said trial. This complaint was Civil Action No. 71-2684-M."

In support thereof, petitioner includes as Appendix E, pages A-6, A-7 and A-8 of his Petition, a Petition for Removal which he filed on October 15, 1971, in the United States District Court for the District of Massachusetts. However, petitioner has failed to include anywhere in the Appendices to his Petition for Writ of Certiorari his two earlier Petitions for Removal with respect to the same state court case. The first Petition for Removal was filed on August 16, 1971, in the United States District Court for the District of Massachusetts, and was remanded to the state court on August 25, 1971. (Appendix A, page , of this Brief.) The second Petition for Removal was filed on September 1, 1971, in the United States District Court for the District of Massachusetts, and was again remanded to the state court. (Appendix B, page , of this Brief.) Each of the three Petitions for Removal (1) involved the same state court case, *Priscilla P. Welsh* v. *Robert V. Pace*, Middlesex County Superior Court, Equity Number 32494, and (2) attempted to remove said case from the state court to the United States District Court for the District of Massachusetts.

Consistent with the Remand Orders of August 25, 1971, and September 1, 1971, the respondent Kalus declined to stay the proceedings at the state court level. As a result of Judge Kalus' decision not to stay the state court proceedings, on November 26, 1971, petitioner filed a complaint with the United States District Court for the District of Massachusetts in which he sought injunctive and other equitable relief to enjoin an alleged deprivation of his rights, privileges and immunities as secured by the United States Constitution and Laws. The complaint was dismissed for failure to comply with Rule 8(a) of the Federal Rules of

Civil Procedure (Appendix C, page , of this Brief), leave to amend was denied, and petitioner appealed. On appeal, the Court of Appeals reversed, holding that petitioner was entitled to file one substitute complaint, which he did (Appendix D, pages , of this Brief). Motions to dismiss were filed by the respondents, and the District Court dismissed the substitute complaint. On appeal, the Court of Appeals summarily affirmed (Appendix A, page A-1, Pet.). This petition followed.

Argument

The District Court's Dismissal of Plaintiff's Complaint was Proper.

The instant case is not one in which a complaint has been dismissed as a technical matter of pleading or where dismissal was for reasons not going to the merits. Rather, the instant case is one in which the District Court considered the complaint on its merits and, in the prudent exercise of i's sound discretion, determined that the petitioner could not, as required by Rule 8(a) of the Federal Rules of Civil Procedure, prove any set of facts in support of his claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (Appendices B and C, pages A-2, A-3, A-4, Pet.).

Neither is the instant case one in which a plaintiff has been denied an opportunity to amend his complaint. See *Ballou* v. *General Electric*, 393 F.2d 398 (C.A. 1, 1968). To the contrary, in the instant case petitioner has, by order of the Court of Appeals, already amended his complaint.

Finally, it should be noted that on two separate occasions petitioner's petitions for removal were not only denied by the District Court, but also, on each of those occasions, the District Court remanded the case to the State Court. *Welsh* v. *Pace*, U.S.D.C., D. Massachusetts, No. 71-1667-W (August 25, 1971); *Welsh* v. *Pace*, U.S.D.C., D. Massachusetts, No.

71-1667-W (September 1, 1971). Clearly, the District Court was of the opinion that the proceedings were not in fact removable. "The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the case was removable." *Metropolitan Casualty Ins. Co.* v. *Stevens*, 312 U.S. 563, 566. And, it is well-established that "the issue of removability is closed if the federal district court refuses to assume jurisdiction and remands the cause." *Metropolitan*, *supra*, at 568.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June, 1973

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 71-1667-W

PRISCILLA P. WELSH
PLAINTIFF
v.
ROBERT V. PACE
DEFENDANT

PETITION FOR REMOVAL

This action is being removed from the Middlesex Superior court within the Commonwealth of Massachusetts Number 32494 in equity to the United States District Court for the District of Massachusetts, pursuant to U.S. Code Title 28, Section 1446—for reason of among others that the same action is presently before the U. S. District Court for the District of Massachusetts. In an action entitled Pace v. King No. 69-1219-M with statement and exhibits attached herewith.

(s) ROBERT V. PACE
ROBERT V. PACE

August 16, 1971

This case is remanded to the State Court because (1) the petition is not verified, and (2) it does not state facts which would entitle relief.

(s) WYZANSKI, C.J.
Aug. 25, 1971

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 71-1667-W

PRISCILLA P. WELSH
PLAINTIFF
v.
ROBERT V. PACE
DEFENDANT

PETITION FOR REMOVAL
Amended

This action is removed from the Middlesex Superior Court within the Commonwealth of Massachusetts No. 32494 in equity to the United States District Court for the District of Massachusetts, pursuant to U. S. Code Title 28, Section 1446—for reason of among others that the same action is presently pending before the U. S. District Court for the District of Massachusetts, in an action entitled Pace v. King, No. 69-1219-M, and further, attached to this petition for removal are certified copies which verify this petition (amended), and a statement of facts which entitles the defendant to removal, per instructions of Chief Justice Wyzanski by order, dated August 25, 1971, on the original petition for removal, dated August 17, 1971.

(s) ROBERT V. PACE
ROBERT V. PACE

Aug. 31, 1971

"This case is remanded
to the State Court."
(s) WYZANSKI, D.J.
Sep 1, 1971

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 71-2684-M

ROBERT V. PACE
PLAINTIFF

v.

LEVIN H. CAMPBELL, individually, and in his capacity as a Judge for the Commonwealth of Massachusetts, ET AL.,
DEFENDANTS

MEMORANDUM

MURRAY, D.J. In this action plaintiff seeks to have this court review a restraining order issued by the Superior Court of Middlesex County, which apparently restrained the activities of plaintiff vis-a-vis Mrs. Priscilla P. Welsh. Jurisdiction is alleged under 28 U.S.C. §§ 1343 and 1443, and 42 U.S.C. § 1985.

Close and detailed examination of the complaint reveals that it is prolix and vague. Factual allegations are so obscure and disjointed that this court will be put to great effort and an inordinate expenditure of time in an attempt to unravel them. Rule 8(a) of the Federal Rules of Civil Procedure establishes clearly that pleadings must contain *a short and plain* statement of the grounds upon which the court's jurisdiction depends, and of the claim upon which relief is demanded. Because of the failure to comply with this Rule, plaintiff's complaint is hereby dismissed.

(s) FRANK J. MURRAY
United States District Judge

Dated December 3, 1971

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 71-2684-M

ROBERT V. PACE
PLAINTIFF

v.

LEVIN H. CAMPBELL, individually, and in his capacity as a Judge for the Commonwealth of Massachusetts;
ANDREW R. LINSCOTT, individually and in his capacity as a Judge for the Commonwealth of Massachusetts;
REUBEN L. LURIE, individually, and in his capacity as a Judge for the Commonwealth of Massachusetts;
HARRY KALUS, individually, and in his capacity as a Judge for the Commonwealth of Massachusetts;
ROGER WITKIN, individually, and as he is a Member of the Federal Bar, and attorney for Defendant, Priscilla P. Welsh;
ROBERT S. WELSH, individually, and as he is a Chemist for the Cabot Corporation;
HELEN L. DREW, individually, and as she is President of Hero-Kinly Incorporated;
PRISCILLA P. WELSH, individually, and as a Clerk for Utica Mutual Insurance Company;
And all those who are in active concert with them.
DEFENDANTS

COMPLAINT AMENDED

1. The jurisdiction of this Court is invoked pursuant to United States Code Title 18, Section 241; Title 28, Sections 1443, 1446, 1447, 1448 and 2361; and Title 42, Sections 1983 and 1985.

2. This is a civil action seeking a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction and other equitable relief, under color of local and state laws, to enjoin the deprivation of the Plaintiff's rights, privileges and immunities, secured by the United States Constitution and Laws.

3. Defendant Levin H. Campbell is or was a judge of the Superior Court of Middlesex County within the Commonwealth of Massachusetts, and Defendants Andrew R. Linscott, Reuben L. Lurie and Harry Kalus are judges at Superior Court within the Commonwealth of Massachusetts. Further Defendant Roger Witkin is or was attorney for Defendants Robert S. Welsh and Priscilla P. Welsh; and Defendant Helen L. Drew is or was a citizen of the Commonwealth of Massachusetts.

THE PLAINTIFF ALLEGES THAT:

4. On or about August 12, 1971, Defendant Levin H. Campbell executed an order against the Plaintiff, which order restrained and interfered with the Plaintiff's exercise of his federally-protected rights.

a. The above-mentioned order was issued ex parte and by application of attachment and bill of complaint;
b. The order was issued at a time when the Plaintiff had no knowledge even that proceedings had been initiated;
c. No showing was made that immediate irreparable damages would result in the absence of an order;
d. Irregularities in the proceedings prompted the Plaintiff to initiate a petition for removal from the State Court to the United States District Court for the District of Massachusetts. Certified copies were filed with the State Court.

5. On or about August 27, 1971, Defendant Andrew

R. Linscott extended the restraining order despite recitals by the Plaintiff that:

a. The instant case had been removed;
b. The Plaintiff was innocent of the charges;
c. The Plaintiff demanded to be heard and to be permitted to produce evidence in his own defense; and
d. He wished to submit to the Court facts that were material and substantially related to the case at hand.

6. On or about October 18, 1971, while the case was within the jurisdiction of the United States District Court for the District of Massachusetts, Defendant Reuben L. Lurie handed down a decision to proceed, notwithstanding the removal and with full knowledge of the following facts:

a. That the proceedings had been removed on October 15, 1971;
b. That the State Court could proceed no further while the removal was in effect;
c. That a certified copy of the removal had been filed with the State Court;
d. That an entry of the removal was made and officially docketed in the State Court and a certified copy of the removal had been filed with the State Court;
e. That the Plaintiff objected to any further proceedings by the State Court for the reasons stated above;
f. Justice Lurie proceeded without authority by assigning the case for trial, and objections and exceptions were taken by the Plaintiff.

7. On or about October 20, 1971, Defendant Harry Kalus, who had been assigned to the case by Justice Lurie, proceeded with a trial in a manner so far departing from any normal course of judicial proceedings, fair play and decency, as to shock the conscience.

a. Justice Kalus proceeded with obvious bias and prejudice and with complete disregard for the Constitutional rights of the Plaintiff, by overruling the objections, recitals and exceptions taken by the Plaintiff;

b. The proceedings were conducted in such a manner that the Plaintiff was brought into the Court under the guise of a witness summons, which witness subpoena was used cleverly to summon the Plaintiff into the Court;

c. The Plaintiff could not have prepared any defense, nor was he given an opportunity to counter balance;

d. The Plaintiff was forced to submit to a trial without counsel and without preparation;

e. The Plaintiff was denied his right to effectively confront and cross-examine his accuser;

f. Defendant Kalus allowed testimony by persons who were without standing in the Court and who did not take the witness stand and did not take the oath;

g. The Plaintiff was never permitted to prove himself innocent of the charges levied against him. No proof was introduced to support any charges against the Plaintiff; furthermore, Defendant Kalus was exceedingly impatient, biased and prejudiced against the Plaintiff, and actually interfered with the Plaintiff's cross-examination by refusing to permit the Plaintiff to cross-examine on matters that were allowed on direct examination.

8. This trial against the Plaintiff so far departed from the accepted and usual course of judicial proceedings and, by suppression and concealment of evidence, was so contrary to the overriding concepts of decency and fair play, that the State Court was prejudiced and biased against the Plaintiff and by such prejudice and bias, individually and

in concert did violate the Plaintiff's Federally-protected rights as outlined in the following counts:

THE PLAINTIFF FURTHER ALLEGES THAT:

COUNT I — Defendant Levin H. Campbell did issue, without authority, a Restraining Order, ex parte, while a pleading of identical nature had been previously presented to the United States District Court for the District of Massachusetts, by Defendant Roger Witkin, attorney for Defendant Priscilla P. Welsh, for reason given by the said Defendant Witkin, upon filing same with the United States District Court, that the action was related to another action then and now pending in the United States District Court for the District of Massachusetts; and by issuing this Restraining Order, ex parte, the said Defendant Campbell did violate the spirit and meaning of Rule 65 of the Federal Rules of Civil Procedure.

COUNT II — Defendant Andrew Linscott, by continuing an illegal Restraining Order which had been entered by Defendant Campbell and by acting in the instant case, while awaiting a decision on the application for Temporary Restraining Order which had been filed in the United States District Court for the District of Massachusetts, did violate the spirit and meaning of Rule 65 of the Federal Rules of Civil Procedure.

COUNT III — Defendant Reuben Lurie did, on October 18, 1971, assign for trial the instant case, while this case was in the jurisdiction and purview of the United States District Court for the District of Massachusetts, and had been since October 15, 1971, and by such assignment for trial after removal did violate U. S. Code Title 28, Sections 1443, 1446(e), 1447 and 1448.

COUNT IV — Defendant Harry Kalus did, on October 20, 1971, proceed with a trial without jury, while this case was in the jurisdiction and purview of the United States District

Court for the District of Massachusetts, and had been since October 15, 1971, and by proceeding after removal did violate U. S. Code Title 28, Sections 1443, 1446(e), 1447 and 1448.

Count V — Defendants Priscilla Welsh and Helen Drew did conspire, concert and combine to interfere with the Plaintiff's rights to legal redress by due process, and by so doing violated U. S. Code Title 18, Section 241, and U. S. Code Title 32, Section 1985.

Count VI — Defendants Roger Witkin, Priscilla Welsh and Robert Welsh did arrange to bring fraudulent, malicious and unjustifiable charges against the Plaintiff, and by so doing did violate U. S. Code Title 18, Section 241, and U. S. Code Title 42, Section 1985.

Count VII — Defendants Levin Campbell, Andrew Linscott, Reuben Lurie, Harry Kalus, Roger Witkin, Priscilla Welsh, Robert Welsh and Helen Drew, directly or indirectly, did deliberately, wilfully and intentionally deprive the Plaintiff of his Constitutionally guaranteed rights by concerting, combining and conspiring under color of State law, statute, ordinance and usage; and they did subject the Plaintiff to unequal and unjust punishment and deprivation of his rights, privileges and immunities which are secured by the Constitution of the United States of America, in violation of U. S. Code Title 42. Section 1983.

Count VIII — Defendants Levin Campbell, Andrew Linscott, Reuben Lurie, Harry Kalus, Roger Witkin, Priscilla Welsh, Robert Welsh and Helen Drew, directly or indirectly, did concert, combine and conspire with malice aforethought deliberately and intentionally against the rights of the Plaintiff, in an attempt to obstruct justice and intimidate parties and witnesses of the Plaintiff, and further did impede, hinder, obstruct and defeat the Plaintiff in his search for legal redress by due process, and with full intention did deny the Plaintiff his equal protection

under the law and did injure him for lawfully attempting to enforce his rights under the equal protection clauses of the Constitution of the United States, in violation of U. S. Code Title 28, Section 1443, and U. S. Code Title 42, Section 1985.

THE PLAINTIFF FURTHER ALLEGES THAT:

A. There is no adequate remedy at law;

B. Unless this Most Honorable Court does duly allow, permit, issue or grant an immediate Temporary Restraining Order, the Plaintiff will continually be harassed, intimidated, threatened and arrested for exercising his Federal Constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and under the Civil Rights Act of 1964, as amended in 1967;

C. Unless the Defendants are immediately restrained and enjoined, they will continue to interfere with the Plaintiff's rights by arresting, prosecution and other intimidations and, further, fail to protect the Plaintiff's present and future rights of liberty, privileges, immunities deprived to the Plaintiff; and thereby be contrary to the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

WHEREFORE, THE PLAINTIFF PRAYS:

(1) That this Most Honorable Court issue immediately a Temporary Restraining Order restraining the Defendants Levin Campbell, Andrew Linscott, Reuben Lurie, Harry Kalus, Roger Witkin, Priscilla Welsh, Robert Welsh, and Helen Drew from harassing, intimidating, threatening and arresting the Plaintiff for exercising his Federal Constitutional rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and under the Civil Rights Act of 1964, as amended in 1967.

(2) That this Most Honorable Court issue immediately a Temporary Restraining Order and a Preliminary Injunc-

tion restraining and enjoining the Defendants, Levin Campbell, Andrew Linscott, Reuben Lurie, Harry Kalus, Roger Witkin, Priscilla Welsh, Robert Welsh, and Helen Drew, their agents, successors, employees and all those in active concert with them in their individual capacities and/or while acting under color and authority of law and/or while acting in the execution of their various duties in their respective positions, from deterring, impeding, discouraging, threatening, harassing, arresting, prosecuting, persecuting, punishing or otherwise interfering with the Plaintiff; or permitting others within their presence and/or under their direction to deter, impede, discourage, threaten, harass, arrest, prosecute, persecute, punish or commit any act of violence or otherwise fail to protect the Plaintiff in the exercise of Federal Constitutional rights, as guaranteed by the Civil Rights Act of 1964, as amended in 1967, and by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

(3) That this Most Honorable Court Issue a Temporary Restraining Order and a Preliminary Injunction to prevent the Defendants from exerting high level, political and judicial influences to discourage and abate civil and criminal suits instituted by the Plaintiff for purposes of redress by due process, as guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

(4) That this Most Honorable Court issue a Temporary Restraining Order and a Preliminary Injunction restraining and enjoining the Defendants from combining and conspiring in any way that would interfere with or deny the Plaintiff's rights, as guaranteed under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

(5) That this Most Honorable Court permanently enjoin the Defendants, their agents, successors and all others

in concert with them, in their individual capacities and or while acting under color of law, from deterring, impeding, harassing, intimidating, threatening, prosecuting, punishing or otherwise interfering with the Plaintiff's Constitutional rights and/or permitting others in their presence or under their instructions to deter, impede, harass, intimidate or threaten or commit any acts of violence, verbal abuse, destruction of property, or otherwise fail to protect the Plaintiff from the exercise of his Federal Constitutional rights of redress by due process guaranteed under the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

(6) That this Most Honorable Court grant such other, further, and different relief as the Court may deem just and equitable.

May 1, 1972

ROBERT V. PACE

Subscribed and sworn to, before me, this 3rd day of May, 1972.

My commission expires